

DEPARTMENT OF STATE REVENUE

LETTER OF FINDINGS NUMBER: 98-0751

Sales and Use Tax

Calendar Years 1992, 1993, 1994, 1995, and 1996

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ISSUE(S)

I. **Gross Retail Tax** – Catering

Authority: 45 IAC 2.2-5-43; 45 IAC 2.2-5-45; Information Bulletin Nos. 7 and 11

Taxpayer protests the assessment of sales tax on labor included in the preparation of food.

II. **Gross Retail Tax** – Hall Rent

Authority: 45 IAC 2.2-4-8

Taxpayer protests the inclusion of donated money to rent a hall

III. **Tax Administration** – Penalty

Authority: I C 6-8.1-10-2.1(d); 45 IAC 15-11-2

Taxpayer protests the penalty assessed.

STATEMENT OF FACTS

Taxpayer is a catering business operated by two couples and has been in business since at least 1992. Taxpayer is not registered with the department. The receipts, expenses, and profits are divided at the end of the year and a Schedule C is included with the individuals' federal tax returns. There are no written partnership agreements, nor have the pairs filed partnership returns.

The couples operate the catering business for parties, picnics, reunions, etc. During the audit period, the parties had a hog operation in which hogs were raised, butchered, roasted, cut up, delivered or served in a ready to eat manner. Taxpayers also supplied baked beans, potatoes, drinks, and other condiments. Taxpayers no longer own the hog operation and during the audit only a couple of incidents occurred where the taxpayers provided a service of roasting or grilling meat that belonged to another party.

The food is prepared both at their homes or at the party site. The grills or roasters are of a portable nature that can be pulled behind a truck or van. The taxpayers have tables, food servers, and various accessories that are used in the catering business.

The entity had never registered with the state to collect and remit sales or use tax. After the start of the audit, taxpayer registered to collect and remit tax with the department.

I. **Gross Retail Tax** – Catering

DISCUSSION

An issue is whether the taxpayer's service income is unitary with the sale of its products.

45 IAC 2.2-5-45 states:

- (a) The law provides that the sale of meals shall be taxable whether such meals are served on or off the premises of the retailer. Accordingly the sale of food or meals by caterers is subject to sales tax.
- (b) The tax applies to the entire charge made by caterers for serving meals, food and drink, inclusive of charges for food, the use of dishes, silverware, glasses, chairs, tables, etc. used in connection with serving meals, and for labor of serving meals.

45 IAC 2.2-1-1 defines Unitary Transaction:

For purposes of the state gross retail tax and use tax, such taxes shall apply and be computed in respect to each retail unitary transaction. A unitary transaction shall include all items of property and/or services for which a total combined charge or selling price is computed for payment irrespective of the fact that services which would not otherwise be taxable are included in the charge or selling price.

45 IAC 2.2-4-1 further explains selling at retail as:

- (1) (a) Where ownership of tangible personal property is transferred for a consideration, it will be considered a transaction of a retail merchant constituting selling at retail unless the seller is not acting as a “retail merchant”.
- (b) All elements of consideration are included in gross retail income subject to tax. Elements of consideration include, but are not limited to:
 - (1) The price arrived at between purchaser and seller.
 - (2) Any additional bona fide charges added to or included in such price for preparation, fabrication, alteration, modification, finishing, completion, delivery, or other services performed in respect to or labor charges for work done with respect to such property prior to transfer.
 - (3) No deduction from gross receipts is permitted for services performed or work done on behalf of the seller prior to transfer of such property at retail.

At hearing, taxpayer protested the inclusion of labor subject to sales tax. In addition it protests the sales to several tax exempt organizations which are actually third party transactions. Taxpayer has not provided the auditor nor the department with exemption certificates or other proof that the sales are exempt from sales tax.

Taxpayer provided copies of invoices which shows meat sold separately stated and meat grilled separately stated on the invoices. Some of the invoices, however, also show how many jugs of B.B.Q sauce, charcoal, pop, spices, etc. are included in the price per rack for grilling.

Under IC 6-2.5-4-2(a), a person making wholesale sales is a retail merchant. A wholesaler may accept from its customers properly executed exemption certificates in lieu of collecting sales tax on purchases provided the customers are registered as retail merchants and the purchases qualify for exemption. Therefore, as a wholesaler, the taxpayer is only authorized to make tax exempt wholesale sales to registered retail merchants who provide a properly executed exemption certificate. Similar restrictions apply to the taxpayer when it acts as a retail merchant.

Indiana Code 6-2.5-4-1 provides that “a person is engaged in selling at retail when, in the ordinary course of his regularly conducted trade or business, he

- 1) acquires tangible personal property for the purpose of resale; and
- 2) transfers that property to another person for consideration.”

Indiana Code 6-2.5-8-8 further specifies who may purchase items exempt from a retail merchant.

Specifically, Indiana Code 6-2.5-8-8(b) provides the following are the only persons authorized to issue exemption certificates:

- 1) retail merchants, wholesalers, and manufacturers, who are registered with the department under this chapter;
- 2) organizations which are exempt from the state gross retail tax under IC 6-2.5-5-21; IC 6-2.5-5-25, or IC 6-2.5-5-26 and which are registered with the department under this chapter; and
- 3) other persons who are exempt from the state gross retail tax with respect to any part of their purchases.

The department has no proof that the sales are exempt. IC 6-2.5-3-7 (b) further states that a retail merchant is not required to produce evidence of nontaxability under subsection (a) if the retail merchant received from the person who acquired the property an exemption certificate which certifies, in the form prescribed by the department, that the acquisition is exempt from the use tax.

Although the taxpayer produced several exemption certificates, the department finds they are incomplete; i.e. without dates, account numbers, type of items purchased, or proper signatures with titles. In addition, Information Bulletin #7 specifically states:

If such meals are prepared and served by a qualified nonprofit organization as a fund raising activity, the proceeds of which are used for the purpose for which such organization is granted exemption from sales, tax, and such organization does not conduct selling activities of any nature on more than thirty (30) days in a calendar year, such organization is not required to collect the sales tax.

Taxpayer is not a qualified nonprofit organization.

FINDING

Taxpayer’s protest is denied. Taxpayer was not properly registered with the department and had no exemption certificates for sales classified as tax exempt to charitable organizations other than third party transactions or incomplete certificates.

II. **Gross Retail Tax** - Hall Rent

DISCUSSION

Taxpayer protests the inclusion of hall rent subject to tax when the money was donated. The department has no proof that the hall rent would be exempt from sales tax. Although the money may have been donated, taxpayers rented the facility in which to have a party.

FINDING

Taxpayer's protest is denied.

III. **Tax Administration** – Penalty

DISCUSSION

Taxpayer protests the penalty assessed. The department finds that the taxpayer failed to register to collect and remit sales and use tax. The Indiana Code and regulations are clear that a person doing business in Indiana must register with the department. The taxpayers filed for their retail merchants certificate after the audit began. A negligence penalty is applicable as the taxpayers failed to register and failed to collect and remit sales tax.

FINDING

Taxpayers protest is denied.